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## The Political Rights and Status of Indigenous Peoples in the 21st Century

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*Te Wananga o Aotearoa*

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## COMMENTARY

# THE POLITICAL RIGHTS AND STATUS OF INDIGENOUS PEOPLES IN THE 21st CENTURY\*

*Tama William Potaka\*\**

### *Introduction*

This brief commentary raises potential issues for consideration in discussion concerning the political rights and status of indigenous peoples looking back and seeing forward.<sup>1</sup> The commentary is divided into four sections:

- **Overview:** Identifying potential motives for defining the political rights and status of indigenous peoples — as individuals and as collectives.
- **Framework:** Offering some initial thoughts around a potential framework for considering political status and the various rights that may attach with that status. This framework implicates numerous issues including the source of the rights and status, enforcement of the rights and potential remedies, and the interface of political rights with economic, social and cultural rights.

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1. This commentary was written for consideration at the 30th Annual Federal Bar Association Indian Law Conference ("Seeing the Future Through the Past") held in Albuquerque, New Mexico, United States of America April 13-15, 2005. The commentary extrapolates further on an earlier article written concerning Māori experiences and how these experiences may inform Federal Indian Law. See Tama William Potaka, *Māori Experiences and Federal Indian Law*, FED. LAW., Mar./Apr. 2004, at 36-42 [hereinafter *Māori Experiences*].

- Māori: Highlighting the current ambiguous positions concerning the Political Rights and Status of Māori in Aotearoa New Zealand under the framework for interpretation offered.<sup>2</sup>

- International Indigenous Advocacy: Discussing further issues concerning international indigenous advocacy options for enhancing our political rights and status.

The commentary concludes with a challenge for greater collaboration between indigenous peoples worldwide on various issues concerning our political rights and status.

### *I. Overview: What are motives for Indigenous Political Rights and Status?*

This section identifies potential motives for defining the political status and rights of indigenous peoples — as individuals and collectives. These motives are influenced primarily by outcomes that indigenous individuals and indigenous collectives seek including but not limited to:

- To live as indigenous individuals and collectives in our own communities, countries and the world;
- To live as human beings or global citizens; and
- To improve our health and wealth.<sup>3</sup>

I sponsor that the Political Rights and Status of Indigenous Peoples in the 21st Century is an issue motivated by “cultural survival” and “creative potential.”

It is trite that indigenous peoples are in different spaces and places in terms of our current political rights and status, and socio-economic-cultural rights and status. Despite this however, there are dominating themes that resonate with many indigenous peoples and in particular with Indian peoples, Alaskan peoples, Kanaka Maoli (Native Hawaiians), and Māori. Our world views including the centering of our genealogical relationships with living and non-living elements, as well as similar histories with evolving United States and British colonization of our communities, suggest that there are shared futures.

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2. This commentary assumes that the reader has a basic understanding of Māori (indigenous people) from Aotearoa New Zealand. See *Māori Experiences*, *supra* note 1 (containing further information); see also MASON DURIE, TE MANA, TE KAWANATANGA (1998) (containing further basic background information about Māori culture, legal and political experiences and Aotearoa New Zealand). This commentary intentionally uses “Aotearoa New Zealand” to reinforce significant demand for a change in the name of the country from New Zealand to incorporate “Aotearoa” — a Māori name for our country.

3. See MASON DURIE, *LAUNCHING MĀORI FUTURES* (2003) (further extrapolating these outcomes in a Māori environment).

As individuals and collectives, indigenous peoples worldwide are currently enjoying different political rights and status at different points of the political spectrum. Some indigenous peoples feel that they have limited political status and may be seeking official recognition by the nation states and governments that they interact with and who may exercise significant powers over them. For these people, Crown / Federal Government recognition of our basic humanity, let alone our indigenous status, is the first step towards ensuring political rights and status are respected. Other peoples may consider that their political status will be elevated by establishing self-governing authorities that can interact with the indigenous peoples they seek to represent and other governments in a government-to-government relationship. At a more basic political and socio-economic-cultural level, many indigenous individuals are concerned more with ensuring that they have enough cash flow to sustain their communities and repositories of customary and contemporary cultural information in light of their people moving away from ancestral homelands to urban areas for work and pleasure. Others are concerned about the decreasing numbers of people with traditional knowledge and the need to fully exercise our potential rights to culture and tradition. Our peoples are in different spaces and places.

The political rights and status of indigenous peoples in our respective countries represents a miner's canary for other cultures and peoples throughout the world — indigenous as well as non-indigenous. If we have been denied rights and status, it will not be too long before other peoples are denied rights and status also. The slippery slope is especially highlighted by the purported homogenization of the world through political, military and commercial drivers. It appears that the responsibility to define, manifest and enforce political rights and status as indigenous peoples — individuals and collectives — and also, for some of us, as Treaty partners, befits the rubric of cultural survival.

Without appropriate definition, manifestation and enforcement of our political rights and status as indigenous peoples, our distinct survival in the political and legal landscape is compromised and recklessly programmed for assimilation into the mainstream of our United States American or Aotearoa New Zealand citizenry. The demographic nature and social-economic-cultural realities of many indigenous communities in the United States and Aotearoa New Zealand respectively coupled with the majoritarian democracy our political systems and their key players espouse, means that the very existence of tribal and pan-indigenous communities are consistently challenged.

Our political rights and status may be the same as other groups at some level. However, to suggest that we are limited to the same individual and

collective rights as non-indigenous folks, and nothing more, is potentially suicidal. Our distinct political rights and status fundamentally underpin our cultural survival. Furthermore however, and this commentary emphasizes, the definition, manifestation and enforcement of political rights and status should not merely be borne out of reaction and the pursuit of social justice. I suggest that we could be motivated by the “creative potential” available to us and key stakeholders like governments, to adopt an innovative posture to exercising and recognizing and enforcing indigenous political rights and status.

There exists a limitless and real opportunity to empower indigenous peoples through the clarification of our political rights and status at various levels of the legal landscape. This creative potential has been pursued vigorously by Māori in New Zealand with minor although measurable success. This commentary suggests that shared international indigenous strategy can better realize creative potential being a motivating factor for the indigenous struggles we encounter on a daily basis. That creative potential is one that should integrate political rights and status with a socio-economic-cultural rights balance to ensure sustainable indigenous development amongst our communities. The dynamic also focuses on appropriate remedies attaching to our political rights and status and that we are not relying on illusory commitments by governments and organizations which are accountable for respecting and upholding these rights.

## *II. Framework: How Can We View Our Political Rights and Status?*

This section offers a framework to streamline discourse surrounding indigenous political rights and status. The framework assumes that rights attach depending on the status that we enjoy as indigenous peoples.

I suggest that as a result of political status, we are able to enjoy certain types of rights. This framework is based on five types of political status through which we may enjoy political rights.<sup>4</sup> The framework offers an alternative view to approaching rights through our status as indigenous peoples, as Treaty partners, as citizens of our countries, as indigenous citizens of the world, and as global citizens.<sup>5</sup>

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4. I assume that the same type of right may exist in two or more status although the right may be interpreted differently depending on the status from which the individual or collective seeks enforcement. For example, the right to freedom of expression (under the Bill of Rights) could be considered your right as a citizen of your country as well as a global citizen (under the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights).

5. This framework does not assume the efficacy of enforcement of these rights where

To extrapolate a little further, this framework suggests that we may enjoy rights:

- *As indigenous peoples*: These rights are similar to the notion of aboriginal title / aboriginal rights.<sup>6</sup> The common law (and sometimes statutory law) recognizes that our own traditions and customs are the source of these rights and status. This is distinct from our rights and status arising out of common law / statutory law imposed on indigenous peoples by governments.<sup>7</sup> Generally, this status is enjoyed by indigenous peoples and is not enjoyed by people who are not indigenous.

- *As Treaty partners*: Many tribal peoples have long standing Treaties and/or agreements with the Federal Governments or the “Crown” in their respective countries. Our status as signatories to these Treaties entitles us to enjoy rights as a Treaty partner that attach to these international agreements. Just like international trade agreements, promises are made and should be upheld.<sup>8</sup> The Treaties can be used as affirmation of, or a source of, political rights and status — often vis-à-vis the other signatories.<sup>9</sup> For example, Māori

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indigenous peoples are involved especially given numerous examples of discriminatory or diminished enforcement where indigenous peoples have tried to exercise our rights irrespective of which status the individual or collective. A major implication of any rights based framework is that every right has a remedy if breached. There is historic discrimination facing indigenous peoples seeking enforcement of our rights within any status identified in this framework. At a very basic level, the enforcement of our rights as indigenous peoples for example, may require the common law courts of the colonizer to acquiesce to the assertion of the rights and enforce the rights against the colonizing authority itself. A significant question of judicial independence concerning indigenous issues remains. Furthermore, enforcement of our rights as Treaty partners is an international legal question, but cost-effective access to international forums and effective legal (rather than moral) enforcement mechanisms are prohibitive to many indigenous individuals and collectives.

6. This commentary assumes that aboriginal title/aboriginal rights may be used interchangeably with customary title/customary rights.

7. The role of the common law with aboriginal title/aboriginal rights is apparently more focused on *declaring* rights and status rather than *interpreting* rights and status. The evidentiary issues are critical however, and evidentiary requirements in different jurisdictions may not be suitable for the full definition and manifestation of indigenous political rights and status.

8. There is certainly space for greater collaboration between Māori and Indians (for example) over how international agreements like the *Te Tiriti o Waitangi/The Treaty of Waitangi 1840 (Te Tiriti/The Treaty)* could work in practice at international and domestic levels in contemporary times.

9. Many domestic courts are reluctant to provide meaningful and independent assessment of the issues arising from these International Treaties and if they do, enforcement is problematic. International panels to assess these issues are often costly and have little, if any, enforcement authority e.g. International Court of Justice. A more cost-effective and meaningful independent international judicial forum or tribunal is required for assessment of International Treaties

and the British Crown entered into an arrangement known as *Te Tiriti o Waitangi / The Treaty of Waitangi 1840 (Te Tiriti / The Treaty)*. This agreement may be an affirmation of or a source of political rights and status for Māori vis-à-vis the British Crown and vice versa. Status as “Treaty partner” is enjoyed by peoples who have entered into international agreements with foreign governments. Generally, this status is limited to nations (including indigenous nations and indigenous collectives) and does not extend to peoples who are not signatories to these documents.

● *As citizens of our countries*: Many of us have rights because we are citizens of our countries. Indians purportedly have rights and status as “Americans” no different from individuals from other ethnic backgrounds. Similarly, Māori apparently have political rights and status similar to other Aotearoa New Zealanders. These rights are found in legislation and the common law.<sup>10</sup> These rights may include the right to vote, the right to freedom of expression and the right to be free of unreasonable search and/or seizure. These documents and legislation are an example of affirmation of the rights and status of Māori as “New Zealanders” rather than Māori as “indigenous people.” Generally, this status is enjoyed by all citizens of the United States of America and Aotearoa New Zealand respectively.

● *As indigenous citizens of the world*: As indigenous citizens of the world we may be entitled to distinct status and accompanying rights by virtue of our indigeneity. The Draft Declaration on the Rights of Indigenous Peoples illustrates that there is discourse at an international level about the rights that indigenous peoples should have as a result of being indigenous citizens of the world (as well as indigenous peoples of our respective countries) and not just as mainstream global citizens.<sup>11</sup> Generally, this status is enjoyed by indigenous peoples and not by people who are not indigenous.

● *As global citizens (or as human beings) of the world*: As global citizens we are able to enjoy the rights and status of other human beings in the world. Our humanity as peoples is fundamental in this status. As humans we can, if our countries are signatories to the appropriate agreements (e.g. International Covenant on Civil and Political Rights), pursue petitions and other forms of

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between indigenous peoples and the Crown / Governments with whom we have agreements.

10. Ko te Tuatoru / Article 3 of *Te Tiriti / The Treaty* guarantees Māori the full rights and responsibilities of British citizens. This essentially affirms the legal position that Māori have, de jure, the same rights and responsibilities as all Aotearoa New Zealanders.

11. See *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection, 43rd Sess., U.N. Doc. E/CN.4/Sub.2/1993/29/Annex I (1993).

action against countries for alleged breaches of the agreements. Generally this status is accorded to all peoples in the world, although enforcement is dependent on the type of right, the forum, and whether the government (e.g., New Zealand government) is a signatory to the Treaty (and with what reservations).<sup>12</sup>

There are other frameworks through which we may consider political status. Some alternative international examples of political status that may be used to analyze rights in international law speak. Hence we may consider "nation state," "self-governing territory," "ethnic minority," or our classic "domestic dependent nation." The framework that this commentary offers seeks to demystify the language to inform ourselves more of why (or the source of why) we should have the political status and political rights that we seek to enjoy. The framework also enables us to question the status that we occupy when asserting specific rights. This clarification of the political status, will contribute to a better definition of each right, the source of the right, as well as its manifestation and possible remedy for breach.

Finally, political status and rights for indigenous peoples importantly, are interdependent with economic, social, cultural and environmental rights. We all need to raise consciousness and awareness with regards to a holistic and integrated approach to political rights and status. Political rights and status will mean nothing unless we are culturally strong and aware (our children sing our songs, know where they are from, and know who their relations are), economically independent (our families are financially literate and wealthy, and our tribal collectives are active economic participants in communities and also contribute to the well being of their tribal members), socially adaptable (able to access the world through technology, able to engage with people of our own and other communities), and environmentally sustainable (we interact with the natural environment and resources in a way that our descendants can undertake the same activities in the future).<sup>13</sup>

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12. Enforcement in domestic jurisdictions will generally depend on the legislative and common law frameworks that exist in the respective jurisdiction. Ratification of the international agreement through domestic legislation is often a starting point for courts considering domestic enforcement of the agreement.

13. This commentary does not discuss this matter extensively, but rather focuses on a framework for understanding the various statuses that indigenous peoples may use when asserting political rights.



### III. Maori: What Are the Political Rights and Status of Māori?

This section outlines some of the current circumstances regarding Māori political rights and status in Aotearoa New Zealand and in the world.<sup>14</sup>

#### A. As "Indigenous Peoples" in Aotearoa New Zealand

The constitutional landscape of Aotearoa New Zealand is ambiguous in recognizing our distinct political rights and status as indigenous peoples — as indigenous peoples — or as "Māori."<sup>15</sup> New Zealand does not have a single written document forming a "constitution." The constitutional landscape includes statutes imported from Great Britain, constitutional conventions, common law, and ordinary legislation including human rights and electoral system laws.<sup>16</sup> In this environment, Māori political rights and status as the indigenous people of Aotearoa New Zealand have never been clarified.

The Crown / government however implicitly recognize that Māori possess rights as "indigenous people." Our political status as indigenous people and accompanying political rights have influenced past Crown / government activity with regards to regulation of the fisheries resource and other general resource allocation.<sup>17</sup>

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14. The section refers to specific, but not exclusive, examples of the circumstances that have developed as a result of our political rights and status. This commentary does not seek to discuss the entirety of the present circumstances affecting Māori.

15. This ambiguity is further intensified by the concept of parliamentary sovereignty in our modified Westminster system of government. The unicameral legislature (loosely referred to as Parliament) is generally considered the ultimate source of authority and our independent judiciary is not considered as having the ability to strike down legislation that it considers "unconstitutional."

16. Judges, legal theorists and academics alike in Aotearoa New Zealand continue to refer to ancient statutes like the Magna Carta 1215 as defining documents in our constitutional landscape. Conventions like Royal Assent to legislation through the Governor-General continue to apply. The common law and ordinary legislation contain fundamental principles inherent in our constitution, and our electoral system is a version of proportional representation distinct to Aotearoa New Zealand.

17. For example, the Crown has carefully used wording in legislation to extinguish our rights as indigenous peoples (customary rights) with regards to deep sea commercial fisheries during a series of agreements struck between Māori fisheries negotiators and Crown representatives in 1989 and 1992. See Māori Fisheries Act, 1989 (N.Z.); Treaty of Waitangi (Fisheries Claims) Settlement Act, 1992 (N.Z.) (particularly the purport of section 9 to extinguish Māori commercial fishing rights). These agreements came to be known as the Māori Fisheries Settlement and the Sealords Agreement, respectively. The settlements came after successful judicial action by Māori to assert customary rights to certain fisheries. See Te Weehi

There is explicit judicial recognition that Māori as indigenous people have, and may continue to retain, a political status that brings with it certain rights that people who are not indigenous to Aotearoa New Zealand do not enjoy. These distinct political rights and status arise out of our indigenous status to the country and are related in the first instance to property rights. In recent judicial dicta, the highest court has stated that the Crown acquisition of radical title at the time of the purported acquisition of sovereignty was not inconsistent with recognition of native property rights.<sup>18</sup>

Importantly for international indigenous discourse however, courts recognize that the source of aboriginal title and aboriginal rights (customary rights) — rights that we enjoy as indigenous people — is not common law or statute. The common law merely recognizes the rights and status. The source of these rights lies in the customs and traditions of indigenous peoples ourselves. The key implication of this exciting line of jurisprudence is that the common law positively affirms that our customs, traditions and connection to the land and resources, could actually constitute rights and status. Our genealogy to ancestral mother earth determines an element of our political rights and status.<sup>19</sup> The rich histories that our cultures possess may be a source for rights that we do have but currently are not exercising, or more importantly, are not being acknowledged and upheld by governments and the judiciary alike.<sup>20</sup>

### *B. As “Treaty Partners” in Aotearoa New Zealand*

#### *1. Te Tiriti o Waitangi / The Treaty of Waitangi 1840*

*Te Tiriti / The Treaty* is often perceived by Māori and many Aotearoa New Zealand academics as a key document in the constitutional landscape of Aotearoa New Zealand. *Te Tiriti / The Treaty* was signed at different locations throughout Aotearoa New Zealand by various Crown representatives, and Māori individuals sometimes acting in an individual

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v. Regional Fisheries Officer [1986] 1 N.Z.L.R. 682 (N.Z.) (discussing customary fishing rights and statutory fisheries regime); *Te Runanga o Muriwhenua v. Attorney-General* [1990] 2 N.Z.L.R. 641 (N.Z.) (discussing the nature of the quota management system in New Zealand fisheries); *see also, e.g.,* Resource Management Act, 1991, §§ 6-8 (N.Z.) (requiring appropriate engagement with Māori in relation to natural resources).

18. *See* *Ngati Apa v Attorney-General* [2003] 3 N.Z.L.R. 643 (N.Z.).

19. *See* *Mabo v. Queensland* [No 2] (1992) 175 CLR 1 (Austl.) (further discussing this matter in the Australian context); *see also* *Ngati Apa v. Attorney-General* [2003] 3 N.Z.L.R. 643 (N.Z.) (obiter discussion of this matter in the New Zealand context).

20. Greater research and teaching is required around these areas of jurisprudence.

capacity and sometimes acting in a mandated capacity as representatives of Māori collectives. Many notable Māori did not sign the document and several refused to sign the document. *Te Tiriti / The Treaty* contains both a Māori language text and an English language text, neither of which is a complete translation of each other.<sup>21</sup>

It is understandable that many Māori consider *Te Tiriti / The Treaty* as a constitutional font for relationships between Māori and the Crown, providing the landscape through which Māori political rights and status — as individuals and as collectives — could be defined, manifested and enforced. Many Māori resort to *Te Tiriti / The Treaty* as both a source of political rights afforded Māori, as well as an affirmation of the political rights and status of Māori as indigenous peoples.

There has been significant discourse generated about the extent to which *Te Tiriti / The Treaty* explicitly addresses the specific details about Māori political rights and status. The formal legal position popularized in Legal Method LAWS 101 and Public Law courses throughout Aotearoa New Zealand law schools and almost strictly adhered to by the bench, is that any rights purporting to be conferred by *Te Tiriti / The Treaty* cannot be enforced in courts unless incorporated in municipal law.<sup>22</sup> In very limited instances, some courts have implied that *Te Tiriti / The Treaty* may be considered even though it is not in statute.<sup>23</sup>

## 2. Waitangi Tribunal

The Treaty of Waitangi Act, 1975 formally uses *Te Tiriti / The Treaty* in a Schedule. The Waitangi Tribunal is established and operates under this legislation as a Commission of Inquiry charged with investigating and

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21. The key provisions of the Māori text highlight (Ko te Tuatahi) a purported transfer of Kāwanatanga (governorship) to the Crown and (Ko te Tuarua) continued exercise of Tino Rangatiratanga (entire chieftainship and dominion), over tāonga (treasures). The key provisions of the English text highlight (Article 1) a purported cession of “sovereignty” to the Crown, and (Article 2) undisturbed and exclusive possession of selected resources and Crown preemption over land purchase.

22. See *Te Heuheu Tukino v. Aotea District Māori Land Board* [1941] 2 All ER 93, 98 (N.Z.). This inevitably places Māori in the invidious but consistent (with other indigenous peoples of the United States of America and elsewhere) position of having to lobby for responsiveness to *Te Tiriti / The Treaty* with only political and not perceived legal basis for the lobbying.

23. See *Huakina Development Trust v. Waikato Valley Authority* [1987] 2 N.Z.L.R. 188, 210 (N.Z.) (commenting that the document was part of the “fabric of New Zealand society” and could be used as extrinsic material resorted to in accordance with statutory interpretation principles).

reporting on alleged breaches of the “principles of the Treaty of Waitangi.”<sup>24</sup> After assessing the validity of claims (both historical and contemporary against the Crown) the Waitangi Tribunal generally makes non-binding recommendations, and the Crown and the Māori collective taking the claim may or may not in turn use the recommendations in negotiating settlement of the alleged grievances.<sup>25</sup>

### 3. *Treaty Settlements*

Since the early 1990s, successive governments have adopted a policy strategy to settle historical grievances of Māori arising out of *Te Tiriti / The Treaty*.<sup>26</sup> There was a policy commonly known as the “Fiscal Envelope” to maintain a non-negotiable fiscal cap of \$1 billion NZD (around \$700 million USD with current exchange rates) in the settlement process, although that is not stated government policy at the present time.<sup>27</sup> Māori expressed and continue to express disagreement with assumptions and principles underlying the strategy, the process used to adopt the settlement strategy, and the fiscal cap proposed. One billion dollars to settle all historical claims was a pittance compared to the contemporary value of the resources illegally and illegitimately alienated from Māori over the nineteenth and twentieth

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24. The principles are distinct from the actual “provisions” of *Te Tiriti / The Treaty*. There are numerous other pieces of legislation that refer to the “principles of the Treaty.” See, e.g., State Owned Enterprises Act, 1986, § 9 (N.Z.). Prior to this legislation coming into force, there was limited use of the term “principles.” There continues to be ambiguity on the true nature and extent of what the “principles of the Treaty” actually constitute.

25. The current jurisdiction of the Waitangi Tribunal is to review claims from 1840 to the present day. Most historical claims revolve around resource alienation including confiscation and takings of land, and unconscionable Crown behavior toward Māori. There have been some creative contemporary claims by Māori alleging breaches of the principles of *Te Tiriti / The Treaty*. These claims extend to policy proposals for the regulation of aquaculture space, Māori entry into the dairy industry, and claims for ownership rights in the broadcasting spectrum (the broadcasting claims have helped accelerate the establishment of numerous Māori language based radio stations and the Māori language based Māori Television Service).

26. There were sporadic earlier attempts by various governments during the twentieth century to engage with tribes and collectives to address concerns arising from specific breaches and allegations of breaches of *Te Tiriti / The Treaty*. The process then, as it is now, was almost inevitably Crown controlled and monitored, and the substance of the “agreements” reached was inevitably minimal and subject to little appropriate commercial and cultural valuation of resources alienated.

27. See OFFICE OF TREATY SETTLEMENTS, N.Z. DEP’T OF JUSTICE, THE GOVERNMENT’S PROPOSALS FOR THE SETTLEMENT OF TREATY OF WAITANGI CLAIMS (1994) (outlining National (party) government policy at that time concerning the “Fiscal Envelope”).

centuries. As well as the fiscal constraints, the Crown has continued to dictate the process and substance of settlements and negotiations.

There have been tribes who have settled their historical grievances (for the time being) with the Crown.<sup>28</sup> The typical process to settlement involves the establishment of legitimate and well-founded grievances against the Crown, sometimes but not always through the Waitangi Tribunal processes. This is followed by designation of appropriate “mandated” tribal representatives for negotiating the settlement, and creation of infrastructure for procuring the settlement. Funding of the settlement discussions follow, with subsequent negotiations and tribal ratification of both a deed of settlement between the Crown and the tribal group, and the development of a tribal governance entity. Legislation implements the deed of settlement and often contains a historical account, Crown acknowledgements and apology for wrongs done, elements of cultural redress, and financial and commercial redress (sometimes including minor pieces of land and buildings).<sup>29</sup>

There is no doubt that our political status and rights, and the leverage that come with them have enabled Māori to pursue a settlement of historical claims. The moral, legal and political force of *Te Tiriti / The Treaty* provides legitimate basis for tribes to have “their day” to seek redress.<sup>30</sup> Beyond that however, the political rights and status of the document may have limited mileage within the domestic body politic. For those tribes who have settled the entirety of their claims, arguments and advocacy around *Te Tiriti / The Treaty* appear unfortunately to be destined to lesser leverage and resort to the popular legal position referred to above seems inevitable unless domestic and international advocacy strengthens.

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28. See Office of Treaty Settlements Website, <http://www.ots.govt.nz> (visited Apr. 21, 2005) (providing further information about the settlements process). Some major tribes have settled (Tainui, Ngāi Tahu), while others continue to engage the Crown in the negotiations process, and others continue to research their grievances.

29. At this stage over \$600 million NZD (about \$450 million USD) worth of cash and assets have been transferred over the last twelve years to Māori tribes and organizations. This capital transfer has enabled some Māori to move into generating more entrepreneurial activity in their organizations and collectives. Social-cultural-economic expansion is a catch-cry amongst Māori, especially if that is geared towards a sustainable economic growth independent of the Crown-Māori relationship.

30. Although with the informal fiscal cap of \$1 billion approaching, tribes who have not settled their claims are trying to accelerate their individual claims. There is a possibility that the Crown “shifts the goalposts” by putting timeframes on the settlement process, with some tribes not being prepared or insufficiently prepared to effectively engage within prescribed timeframes.

#### 4. *Foreign Affairs and Trade*

The Ministry of Foreign Affairs and Trade provides an interesting example of the engagement of *Te Tiriti / The Treaty* by the Crown / government in a contemporary policy setting.

*Te Tiriti / The Treaty* obligations are being considered of sufficient importance to warrant minor acknowledgement in Aotearoa New Zealand's trade agreements. There is increasing consciousness within Māori and the Crown / government to ensure Treaty responsiveness in international trade and tariff agreements that the government is entering into.

The recent Closer Economic Partnership Agreement with Thailand (Thailand Agreement) provides for the New Zealand government to recognize the unique contribution that Māori offer to the domestic New Zealand economy.<sup>31</sup> The Thailand Agreement also provides the government with the ability to act freely in accordance with its Treaty of Waitangi obligations.<sup>32</sup> Article 15.8 of the Thailand Agreement provides that New Zealand will not be prevented from adopting measures that it deems necessary to accord more favorable treatment to Māori, including in its fulfillment of its obligations to Māori under the Treaty of Waitangi. If Thailand invokes a dispute settlement under certain provisions to investigate any action taken by New Zealand under this Article, an arbitral tribunal will not be able to interpret Treaty of Waitangi.

The Thailand Agreement does not confer any further obligations upon the government towards Māori and practical implementation of the clause is still uncertain. Furthermore, there is no guaranteed Māori involvement as Treaty partners in the negotiation or enforcement of process under the Thailand Agreement. Prima facie, there is skepticism and general Māori suspicion that these acknowledgements may only be a paper promise for Māori and a general "get out of jail" clause for the Crown / government who may be ready to use *Te Tiriti / The Treaty* to avoid commitments to Thailand and other countries yet not provide real tangible "on the ground" outcomes to Māori as a result.

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31. Thailand is Aotearoa New Zealand's eighteenth largest export market, and Aotearoa New Zealand is Thailand's thirty-eighth largest export market. All trade restrictions like tariffs and quotas are to be removed by 2025. See also our Closer Economic Partnership with Singapore. Aotearoa New Zealand may be the first western country to secure a similar agreement with China and negotiations between the governments presently continue. For further information concerning these matters, consider the Ministry of Foreign Affairs and Trade's Website, <http://www.mfat.govt.nz> (visited Apr. 21, 2005).

32. Although Aotearoa New Zealand's government cannot abuse this article as it specifically prevents the government from using this measure as a means of arbitrary or unjustified discrimination against Thailand.

This perhaps is a signal to Māori that future *Te Tiriti / The Treaty* references in similar agreements will not be controlled by Māori and will be geared primarily to the benefit of the other partner to the agreement — the Crown.

*C. As “New Zealanders” in Aotearoa New Zealand*

The position of Māori as Aotearoa New Zealanders is legally unquestionable. Ko te Tuatoru — Article Three of *Te Tiriti / The Treaty* affirms and guarantees Māori the same rights as other “British citizens.” This guarantee is generally interpreted to mean that we enjoy the same rights as other Aotearoa New Zealanders. We therefore, *de jure*, enjoy rights encapsulated in legislation such as the New Zealand Bill of Rights Act, 1990, and other documents confirming political rights and status, e.g., Bill of Rights (UK) 1688.<sup>33</sup>

As an interesting example of these political rights and status in our constitutional system, our unicameral legislature provides for distinct Māori electoral representation. The legislature has 120 Members of Parliament with around half of those members representing electorates (geographical districts) and the other half representing parties and drawn from party lists.<sup>34</sup> There are two types of electorates — around fifty-five general electorates and seven Māori electorates which are superimposed over the “general” electorates.<sup>35</sup> Electors are either on a general roll or a Māori roll and get two votes — one for the geographic representative and one for the preferred party (party vote). This guarantees Māori representation in the legislature. There are around twenty Members of Parliament who have Māori ancestry.<sup>36</sup>

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33. See, e.g., Claire Charters, *Māori — Beware, the Bill of Rights Act*, [2003] N.Z.L.J. 401 (discussing the interaction between the New Zealand Bill of Rights Act 1990 and Māori, including tribal, organizations). The political rights and status that indigenous individuals have vis-à-vis indigenous organizations may also be at issue. Should indigenous organizations also outline political rights of indigenous peoples? If indigenous organizations breach of our political rights, what forums are available to enforce these rights. What if the tribal government prevented a qualified elector from voting in tribal elections, or tribal police breached rights to be free from unreasonable search and seizure?

34. Our electoral system is commonly known as the Mixed Member Proportional system and replaced the former First Past the Post system in around 1993.

35. There has been a consistent recent call by some parties represented in the legislature that the Māori seats should be abolished. These parties have not had recent success in contesting the Māori seats and many parties are choosing not to have candidates contest the Māori seats at this year's election.

36. There is now a political party called “The Māori Party” which has representation and will contest the seven Māori electorate seats competitively at this year's election. This party emerged after leader Tariana Turia left the Labour government and Cabinet due to severely

There are however, discouraging signs from the legislature and the judiciary that the *de jure* political status of Māori as Aotearoa New Zealanders does not necessarily mean that *de facto* we are able to enjoy the same rights as every other Aotearoa New Zealander. It appears that our New Zealand citizenry continues to be undermined by the legislature on the grounds of our indigeneity or ethnicity as indigenous peoples. The recent Foreshore and Seabed Act, 2004 and associated issues have suggested that when private property rights of Māori may be prioritized over the perceived “common good” of all Aotearoa New Zealanders, we may be treated differently with access to justice and procedural and substantive due process. There continues to be a threat of marginalization of Māori status and rights as Aotearoa New Zealanders when the issue of Māori pursuing rights as “indigenous peoples” or as “Treaty partners” is at stake.

#### *D. As “Indigenous Peoples” in the World*

Māori and other indigenous peoples in the world continue to seek global recognition and endorsement of political rights and status through international organizations like the United Nations, the World Bank and the International Monetary Fund. These organizations have significant influence at inter-governmental level and also trickle down influence in our communities through financial and regulatory pressures on governments. Unfortunately, our political status and rights as indigenous peoples in the world have yet to exert monumental influence on these institutions.

At the United Nations for example, after a Decade of Indigenous Peoples, the Draft Declaration on the Rights of Indigenous Peoples meanders its way through the United Nations and remains a draft declaration. Unfortunately however, *prima facie* it appears that the document represents more a negotiation between nation states (i.e. not between indigenous peoples) as to the acknowledgements or declarations that should be accorded by those states to indigenous peoples. The lack of significant indigenous control of the drafting process and the substance for the document probably reinforces the need for indigenous peoples worldwide to facilitate our own forums to engage on agreements and arrangements between ourselves controlled by ourselves and not with the nation states and governments that currently seek to govern us.

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different perspectives concerning policy proposals surrounding the ownership and management of the foreshore and seabed arising out of the case of *Ngati Apa v. Attorney-General* [2003] 3 N.Z.L.R. 643 (N.Z.). See Māori Party Website, <http://www.maoriparty.com> (visited Apr. 21, 2005).



*E. As "Human Beings" or "Global Citizens" of the World*

Māori and other indigenous peoples have legitimate political status and rights as global citizens also. There are various international documents like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, that do provide rights for indigenous individuals and collectives as a result of our status as *human beings*. This status is the ultimate harbinger of our humanity that should, for example, like discriminated ethnic minorities in Nazi Germany and Europe or black and other "non-whites" in apartheid South Africa, be used to justify international condemnation and if required intervention to ensure that our rights as human beings are upheld.

Neither International Human Rights theory nor these international instruments are a panacea to the challenges that indigenous peoples face on a daily basis. However, the rubric of international human rights and the fact that as global citizens we are able to exercise political status and rights, does provide an international avenue for exercising and enforcing (albeit through moral means) a political status and rights that we all enjoy.

Over the last decade, Māori collectives and individuals have been consistently approaching international organizations to assess government intervention and breaches of international human rights that we enjoy as global citizens. As an example, Māori have recently sought to leverage our status as global citizens through use of the Committee assessing claims under the International Convention on the Elimination of All Forms of Racial Discrimination (the Committee). Just last month the Committee charged that the New Zealand government may be in breach of international law obligations with legislation concerning the foreshore and seabed areas.

Litigation had ensued with appeal to the court of appeal over the jurisdiction of the Māori Land Court<sup>37</sup> to investigate the status of certain specific areas of foreshore and seabed, and whether they could be declared "Māori customary land" under enabling legislation.<sup>38</sup> Māori tribes involved

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37. The Māori Land Court has statutory jurisdiction over Māori land issues and is regulated by Te Ture Whenua Māori (Māori Land) Act, 1993 (N.Z.). "Māori customary land" is land that is held "according to tikanga Māori" (Māori customs and traditions). There is also a separate status of land known as "Māori Freehold Title" that is essentially a fee-simple title containing restrictions on use and alienation.

38. See *Ngati Apa v. Attorney-General* [2003] 3 N.Z.L.R. 643 (N.Z.). Under the Te Ture Whenua Maori Act, 1993 (N.Z.), "Māori customary land" and "Māori freehold land" have separate status. These statuses are two of the six possible status of land in Aotearoa New

had requested the Māori Land Court to inquire into the status of specific areas within their tribal territory. These areas have significant aquaculture development opportunities within them and mineral (including oil and natural gas) potential.

The Court of Appeal held (in June 2003) that the Māori Land Court does have the jurisdiction to investigate the title to the foreshore and seabed in the particular area. In addition, the court of appeal declared in obiter that the radical title acquired by the Crown at the time of the purported acquisition of sovereignty was not inconsistent with the common law recognition of native property rights — our rights as indigenous peoples. This decision sparked major interest by Māori tribes, and non-Māori nationally. Māori considered that we had secured a limited opportunity to exercise our rights to access justice and due process as “Aotearoa New Zealanders” to affirm our rights as indigenous peoples (through the notion of aboriginal title / rights). We could go to court and have our claims adjudicated fairly and independently because we were Aotearoa New Zealanders like everyone else.

The Crown / government had different ideas. Immediately after the decision, the Prime Minister and other high-ranking non-Māori government members, without apparent consultation with Māori individuals or collectives, declared that legislation would be passed to prevent Māori from gaining exclusive ownership of foreshore and seabed areas. This statement effectively formed the basis of legislation later passed vesting most of the foreshore and seabed in the Crown, excluding Māori from an independent judicial determination of our ownership rights to the foreshore and seabed.<sup>39</sup> Under the new legislation, Māori collectives are able to seek nominal statutory rights that recognize limited Māori usufruct rights, but are not able to seek a declaration of ownership in the specific areas of foreshore and seabed.

As a result of Crown action, several Māori collectives representing tribes and Māori collectives decided to pursue an international strategy through the Committee. The group asserted their rights as global citizens to pursue this strategy. The rights under the CERD are not specific to indigenous peoples. Instead they are rights that all people share throughout the world (even though only some countries may be signatories to the CERD).

The Committee released an initial finding that the New Zealand government may be in breach of international law obligations stating that, “The legislation contains discriminatory aspects against Māori, in particular in its extinguishment of the possibility to establishing Māori customary title

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Zealand.

39. See *Foreshore and Seabed Act, 2004* (N.Z.).

over the foreshore and seabed and its failure to provide a guaranteed right of redress.”<sup>40</sup> This is a significant moment, and hopefully not a high-water mark, for Māori leveraging from our position as global citizens seeking to exercise and enforce (albeit through the moral rather than legal enforcement) our international political rights and status.<sup>41</sup> We have been able to pursue and obtain international acknowledgement for breaches of rights that we enjoy as global citizens. The next steps in the international strategy appear to be gaining international acknowledgement for breaches of rights that we enjoy as Treaty partners and more importantly as indigenous peoples.

#### *IV. International Strategy: What Can We Do Together?*

This section outlines some options concerning international indigenous advocacy options for enhancing political rights and status for indigenous peoples.

I believe that the political rights and status of indigenous peoples globally rests on basic assumptions implicit in our collective world views and

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40. See Committee on the Elimination of Racial Discrimination, Decision 1 (66), 11 March 2005, New Zealand Foreshore and Seabed Act, 2004. The Committee for the CERD added that it was concerned at the apparent haste with which the legislation was enacted and that insufficient consideration may have been given to alternative responses to the *Ngati Apa* decision which may have accommodated Māori rights within a framework more acceptable to both Māori and all other New Zealanders. The Committee referred to the significant opposition to the legislation amongst Māori and urged the government “in the spirit of goodwill” and “in accordance with the ideals of the Treaty of Waitangi” to resume a dialogue with Māori with regard to the legislation in order to seek ways of lessening its discriminatory effects, including where necessary through legislative amendment. Looking to the future, the Committee requested the New Zealand government to monitor closely the implementation of the Foreshore and Seabed Act, its impact on the Māori population and the developing state of race relations in New Zealand and to take steps to minimize any negative effects, especially by the way of a flexible application of the legislation and by broadening the scope of redress available to Māori. The Committee requested that the government includes full information on the state of the implementation of the Foreshore and Seabed Act, 2004 (N.Z.) in their periodic report to the Committee by the end of 2005.

41. The government has eschewed the Committee’s position already by seeking to diminish the impact of the comments of the Committee. The government has also pursued negotiations with a mining company to take seabed samples from the mineral rich West Coast seabed. Māori involvement in these negotiations has been negligible if any and it appears as though the “conspiracy theory” of commercial motives driving the Foreshore and Seabed Act’s vesting of the areas into government ownership, is proving true. See Chimene del la Varis, *Foreign Bid to Mine Seabed Sparks Fury*, WAIKATO TIMES, Mar. 9, 2005, available at <http://www.stuff.co.nz/stuff/0,2106,3213100a7693,00.html> (providing further information about the proposed mining on the West Coast).

relationships with natural resources, similar histories of colonization, and similar futures. These assumptions are based around the following shared long term outcomes that we as indigenous individuals and collectives may have:

- To live as indigenous persons in our own countries and in the world;
- To live as human beings or global citizens; and
- To improve our health and wealth.

In order to reinforce our world views, to build relationships with natural resources, and to achieve the three informal goals identified above, I recommend an international indigenous political, legal and commercial strategy.

An enhanced collaborative international indigenous approach to advocacy on political status and rights is ripe for consideration. For years, Māori, Hawaiians, Alaskans, Indians and other indigenous peoples such as Sami from northern Scandinavia, have worked together and formed informal networks especially around the United Nations processes. Some of us are delivering courses on international indigenous issues. We attend conferences and share emails regarding the same issues. However, there is clear and present need for improved sharing of strategies and information for international indigenous advocacy.<sup>42</sup> This strategizing and information sharing should not only be political, but also spiritual, legal, commercial and cultural in nature.

The most pressing element of a sustainable international indigenous approach to advocacy on political status and rights is the cultivation of values based inter-generational relationships between us and our families, tribes, organizations and peoples. With sustainable long-term relationships, we can build the information sharing and networking strategies suitable for intra-indigenous development. It is suggested that with these relationships and strategies, we will be able to move on creating a worldwide indigenous database and network to leverage our collective and individual strengths.

Looking back to the past and seeing the future, (it is not only conceivable) it is inevitable to me that international gatherings and eventually international treaties between indigenous nations and indigenous peoples will be a feature of the indigenous legal landscape. There are significant opportunities for indigenous peoples to enter into *international agreements with one another*

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42. There need is matched by strategic planning to accelerate indigenous legal capacity especially in areas of critical importance to longitudinal indigenous development e.g. technology and intellectual property, constitutional law, international finance and commerce, international litigation and arbitration, and governance.

*as collectives and one another as individuals.* The writing is, fortunately, on the wall.

Our political rights and status vis-à-vis the Aotearoa New Zealand government and/or United States Federal government, may actually differ with our political rights and status vis-à-vis one another. There is wide scope for more creative thinking as to how we organize our relationships between ourselves and other people more independently of the federal or state apparatus. This could be through political Treaties between one another, or commercial deals or agreements between tribes and peoples. It could be through sharing cultural performances at The Gathering of Nations or the bi-annual Māori Performing Arts Festival, and spiritual engagement with one another. It could be through setting up collaborative organizations like the Advancement of Global Indigeneity — a group established through the auspices of the Americans for Indian Opportunity and Advancement of Māori Opportunity with shared governance representation between Indians and Māori and Greek indigenes.<sup>43</sup> As a start however, for an international indigenous legal strategy that builds these relationships, I recommend that the following objectives be immediately considered for the next one to two years:

- Annual reciprocal exchange between ourselves at conferences, seminars and courses throughout the United States, Canada, Australia and Aotearoa New Zealand — between the Federal Bar Association Indian Law Conference and the Māori Law Society annual conference in New Zealand; and
- Creation of a database through collaboration of law schools and practitioners that is web based and accessible to indigenous individuals

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43. See Americans for Indian Opportunity Website, at <http://www.aio.org> (visited Apr. 21, 2005) (Indian programme information); Advancement of Maori Opportunity Website, <http://www.amo.co.nz> (visited Apr. 21, 2005) (Māori programme information). Other possibilities are endless: at a state / tribal level for example, the self-governing entity for the Native Hawaiian nation may re-enter international agreements starting with a commercial agreement to supply the Mohegan nation with tourism advisory services in exchange for legal advisory services over one year. A Māori tribe, say Ngāi Tahu, may enter into a Treaty with tribes in the State of Washington to establish international indigenous benchmarks between themselves concerning salmon fisheries. These creative relationships could even be formalized arrangements at an organizational level like the National Native American Bar Association and the Māori Law Society. It may be through Memorandums of Agreement between federal agencies, States and tribes, or political commitments to have guaranteed representation in political institutions. It could also mean tribal organizations outline their commitments to upholding human rights for individuals on the reservation and ensuring political rights are accorded their members. Finally, it could be constitutional change to enshrine the political status of indigenous peoples within the domestic sphere. The potential is limitless and the need for creative, dynamic thought never more urgent and important.

throughout the world, and containing indigenous legal submissions, legal articles and other matters for better research, advocacy and practice in our respective jurisdictions.<sup>44</sup>

Building inter-generational relationships with one another is a catalyst to unlock meaningful and sustainable international indigenous networks.

*Conclusion: Where Have We Been and Where Are We Going?*

This brief commentary has sought to provoke thought and discussion on the political rights and status of indigenous peoples looking back and seeing forward.

This commentary states that the motives for defining these political rights and status should be clear. I suggest appropriate definition, manifestation and enforcement of these rights could be borne from the twin motives of cultural survival and creative potential.

The framework that this commentary offers is only one of many options for considering our political rights and status. We have different rights as indigenous individuals and as indigenous collectives. This framework adopts the approach that we could have rights emerging from our status as indigenous peoples within our respective countries, as Treaty partners (where there is a Treaty or agreement between indigenous peoples and the Crown / Government), as citizens of our countries, as indigenous peoples in the world, and as global citizens. The rights and status may be sourced in our customs, in common law or legislation, or in international instruments.

Māori political rights and status in New Zealand continue to operate at different levels. Our experiences however, suggest innovative alternatives in approaching the issues surrounding political rights and status. Māori have often leveraged our position as Treaty partners, and we have also used our position as New Zealand citizens and as citizens of the world to make incremental steps to improve our political status and outcomes. Furthermore, it is becoming more difficult to leverage from the Treaty and as our status as indigenous peoples, especially without entrenched legislation securing our constitutional position as indigenous peoples and Treaty partners. These experiences may be useful for Indians, Alaskans and Hawaiians alike as peoples seek to adopt creative strategies for enhancing relationships with one another, and with the United States Federal government.

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44. See <http://www.vuw.ac.nz/law/indigenous> or <http://www.kennett.co.nz/law/indigenous> for a very informative and exciting example of such a database.

Finally, the commentary offers some further ideas concerning international indigenous advocacy options for enhancing political rights and status for indigenous peoples. Our efforts should focus on increased indigenous legal advocacy and efforts through networking and information sharing, and immediate information sharing for specific issues such as the recognition issues facing non-federally recognized tribes, the self-government issues facing our Kanaka Maoli relations, and techniques for sustainable community development and survival for our brothers and sisters in Alaska.

I suggest a hard network through an organization and/or database amongst international indigenous legal organizations and inclusive of tribal leaders, academics, practitioners, judges, students, and politicians should be formed immediately to accelerate the enhancement of the political status and rights of indigenous peoples worldwide over the next century.

Our lives and the indigenous futures of Indians, Māori, Alaskans and Kanaka Maoli are interdependent. We will be here in 2100. We will be tribal. We will be non-tribal. We will be pan-tribal. We will be demographically multi-ethnic. We will evolve and develop our identities and our communities. And our interdependent struggle will continue on various individual and collective fronts without end.

Let's sit down and talk more story and plan ahead for the challenges and opportunities we will face together.